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The Director
Central Intelligence Agency

OLC 77-1499

Approved For Release 2005/01/06 : CIA-RDP81M00980R000200010047-8



Washington, D.C. 20505

Honorable Daniel K. Inouye, Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

A significant effort of the Central Intelligence Agency, particularly of senior management, has been devoted to the administration of the Freedom of Information Act, while very little information of interest to the public has, in fact, been released through the mechanism of the Act.

I request that you give consideration to the enclosed statement which describes the problems faced by CIA resulting from the FOIA and the desirability of obtaining legislative relief.

Yours sincerely,

STANSFIELD TURNER

Enclosure

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Central Intelligence Agency

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Washington, D.C. 20505

Honorable Melvin Price, Chairman
Subcommittee on Intelligence and Military
Application of Nuclear Energy
Committee on Armed Services
House of Representatives
Washington, D.C. 20515

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SUMMARY OF FOIA IMPACT ON CIA

Before 1974 FOIA Amendments:

- 1974 requests - 193
- employees involved - 5

After 1974 FOIA Amendments:

- requests to date - 15,287
- employees involved - 70 full-time, 180 part-time

Inordinate amount of time and effort, including much senior management time, is devoted to search and review of documents.

- time and dollar expenditures for 1976 -
 - 181,995 man-hours or 87.5 man-years
 - \$2,000,000

Thousands of man-hours are frittered away on futile document searches because the amended FOIA requires that a request be only "reasonably described" and that all "reasonably segregable portions of documents must be released." Broad document descriptions consume a tremendous amount of time because each document must be examined in its entirety to determine whether segregable portions can be released. This requires review of extensive files for information on particular intelligence operations, even though it is clear before the review begins that no material of significance can be released because it is classified or involves sources and methods:

Example:

- A recent request for all records on the "Berlin Tunnel Operation" will involve a search and review of some 1,400 linear feet of files, taking months of time when it can be predicted ahead of time that nothing of significance can be released.

PROBLEMS CONFRONTING THE CIA RESULTING
FROM THE FREEDOM OF INFORMATION ACT

Before the effective date of the 1974 amendments to the FOIA which amended the provisions of exemption (b)(1), the CIA received very few requests for documents. In fact, during 1974 only 193 requests --mostly requests for declassification pursuant to the procedures of Executive Order 11652--were processed. A staff of five people, whose primary responsibility was to monitor the Agency's classification system, was sufficient to handle all these requests.

The amendments of the FOIA in February 1975 and the strong public interest in CIA which developed at about the same time resulted in a sharp increase of requests for CIA records. To date, the Agency has received 15,287 requests and has 70 employees engaged full-time and 180 employees engaged part-time working on processing FOIA requests. Because of this volume, and despite earnest efforts, it has not been possible to respond to FOIA requests within the statutory time frame.

It should be emphasized that these figures do not by themselves reflect the most burdensome requirement of the Act, i.e., the time devoted by senior executives of the Agency. Decision-making on FOIA matters is maintained at a high level to ensure that they receive the attention that the law demands. Appeals from initial Agency determinations are handled by the Deputy Directors of the CIA with the assistance of senior staff officers and attorneys from the Office of General Counsel. The number of appeals has steadily increased (now approximately 640 cases) and the time devoted to these matters by the CIA Deputy Directors has increased proportionately. The resulting diversion of these senior officials' energies from their primary duties to manage the business of the Agency is clearly undesirable.

The amended section (a)(3) of the Act requires only that a request be "reasonably described." Thus, a precise description of records sought is no longer necessary and requests for documents are now being received under broad, albeit identifiable, descriptions. A particularly burdensome requirement of the amended Act is that "reasonably segregable portions of documents must be released." Because of this provision, the review process consumes an inordinate amount of time in that each document must be examined in its entirety to determine whether segregable portions can be released.

The search and review of intelligence documents involves more time and effort than is required in the review of other types of documents. Generally, the releasability of an intelligence document cannot be determined by a review of the document alone. In order to ensure the protection of intelligence sources and methods which may have been involved in the subject matter of the requested document, the reviewer must frequently examine other documents to assure that such intelligence sources and methods are not compromised through the release of the requested document. This additional review is most critical and must be done carefully.

The judicial review procedures in the FOIA require significant Agency effort in the preparation of FOI litigation. Pursuant to the ruling of a leading FOI case (Vaughn v. Rosen, 484 F.2d 820 D.C. Cir. 1973; cert. denied) the Government must, in order to justify withholdings under the Freedom of Information Act, formulate

a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portion of the documents.

Such an indexing system would subdivide the document under consideration into manageable parts cross-referenced to the Government's justification.

The burden of complying with Vaughn in cases involving large numbers of classified documents is obvious.

The amended Act, in overruling the decision of the United States Supreme Court in EPA v. Mink, 410 U.S. 73 (1973), authorizes a Federal district court to make a de novo determination whether material, claimed to be exempt under the first exemption, is properly classified substantively as well as procedurally. However, the Court is not expected to substitute its judgment for that of the Executive Branch on the substantive question whether the material in issue should or should not be classified. Rather, the question to be determined by the Court is whether the appropriate Executive Branch officials have adhered to the procedural requirements and have properly applied the substantive criteria, set forth in Executive Order 11652, in arriving at their decision. The legislative history of the 1974 amendments to the Freedom of Information Act establishes this principle. The conference report on the Act states, at page 12:

[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom

of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

The case law developed as a consequence of FOIA litigation involving the CIA clearly supports the proposition that the Court's inquiry into classification questions is limited. This principle has, perhaps, been most effectively articulated by Judge Gesell of the United States District Court for the District of Columbia in Klaus v. CIA, Civil Action No. 76-1274, November 4, 1976:

If, on the other hand, the Court is required to satisfy itself that disclosure is likely to affect the national security adversely, difficulties are presented. Obviously, a Court aided only by an in camera document examination does not have the training or competence to make a judgment as to the national security implications of classified material. An ex parte hearing with Agency personnel would be required, resulting in a distasteful Star Chamber--like proceeding from which the guarantees of trustworthiness achieved by confrontation and cross-examination are absent. There is, moreover, no guarantee that such a hearing could, in the last analysis, give adequate guidance. The national security issue is necessarily speculative. Intelligence deals with possibilities. Our knowledge of the attitudes of and information held by opponents is uncertain. Determinations of what is and what is not appropriately protected in the interests of national security involves an analysis where intuition must often control in the absence of hard evidence. This intuition develops from experience quite unlike that of most Judges.

The Circuit Court of Appeals for the District of Columbia has also squarely supported this principle in Weissman v. CIA, et al. (No. 76-1566; January 6, 1977; USCA D.C. Cir.) in which it says, at page 13, slip opinion:

Additional considerations apply to in camera proceedings under exemption (b)(1) where classification of documents is involved. Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information. Congress was well aware of this problem, and when it amended the FOIA to permit in camera inspection in exemption (b)(1) cases, it indicated that the court was not to substitute its judgment for that of the agency. If exemption is claimed on the basis of national security, the District Court must, of course, be satisfied that proper procedures have been followed, that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document logically falls

into the category of the exemption indicated. It need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

Protection of information pertaining to intelligence sources and methods is effected by §102(d)(3) of the National Security Act of 1947 and §6 of the Central Intelligence Agency Act of 1949, (50 U.S.C. 403(d)(3) and 403g). The legislative history of the FOIA includes both of the above cited statutory provisions among its list of non-disclosure statutes encompassed by exemption (b)(3) of the Act. United States district courts, without exception, have also recognized these statutes as within the purview of exemption (b)(3) of the Freedom of Information Act. In addition, the United States Court of Appeals for the District of Columbia Circuit (Weissman, *op cit.*) and the Third Circuit, (Richardson v. Spahr, 416 F.Supp. 752 (W.D.Pa., 1976); *aff'd* ___ F.2d ___ (3rd Cir., 1977) have afforded similar recognition.

Thus, it seems well settled that the Congress as well as the courts have recognized that classified information relating to intelligence matters and information pertaining to intelligence sources and methods is exempted from disclosure under the FOIA.

Nevertheless, the Act, as it applies to the CIA, results in an undesirable situation which the drafters could not have anticipated. When FOIA requests reach CIA files on intelligence operations, each document in such files must be reviewed word-by-word to determine whether any portion can be released. This requirement is not only extremely burdensome on the Agency for the reasons outlined above, but it is wasteful and almost absurd when files on intelligence operations are requested and when, as is frequently the case, it is clear even before the review begins, that no material of significance can be released in response to the request because it is classified or withholdable pursuant to the sources and methods statute. (For example, a recent request for all records on the "Berlin Tunnel Operation" will involve a search and review effort of some 1,400 linear feet of file material. While the search and review of this material is likely to consume many months, given the nature of the records, it can be predicted with reasonable certainty that virtually nothing can be released.)